Teamsters National Automobile Transporters Industry Negotiating Committee *and* International Association of Machinists and Active Transportation Company and General Teamsters Local No. 654. Case 16–CE–22

August 27, 2001

DECISION AND ORDER

BY CHIARMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On August 3, 1999, Administrative Law Judge Pargen Robertson issued the attached decision. Respondent Teamsters filed exceptions and a supporting brief, Charging Party Machinists and Active Transportation (Active) filed answering briefs, and Teamsters filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that the work-preservation agreement between Teamsters and Active (the Agreement) violates Section 8(e) of the Act because it restricts the work of another company, Safety Carrier, over which the judge found Active has no right of control, and thus it requires Active to cease doing business with another entity. In its exceptions, Teamsters asserts, inter alia, that the Agreement is lawful under Section 8(e) because it is intended to preserve the work of bargaining unit employees rather than to achieve a secondary object. Teamsters further argues that the judge erred in finding that Active does not control Safety Carrier. We find merit in Teamsters' exceptions. Thus, contrary to the judge, we find that the Agreement is not unlawful on its face because it expresses an intention to preserve bargaining unit work for unit employees and because, by its terms, it restricts only the work of entities over which Active exercises a right of control.

I. FACTS

The allegations in the complaint relate to two businesses that are part of a complex of ventures owned, in various combinations, by Charlie Johnson, Alice Houston, Wade Houston, and Dennis Troha. These individuals formed Active in November 1994.[2]

Active, a trucking firm engaged in the business of transporting new automobiles and heavy-duty trucks, is a party to a collective-bargaining agreement with Teamsters. Active is a partnership owned indirectly by Johnson-Houston Corporation and by Seven T's Corporation. Johnson-Houston, in turn, is owned by Johnson and Wade Houston, and Seven T's is owned by Troha. Johnson serves as Active's managing partner, chairman, chief operating officer, and president.

Safety Carrier, a corporation engaged in hauling automobiles from railheads and plants, has a collective-bargaining relationship with Machinists. Safety Carrier is a wholly-owned subsidiary of Automotive Carrier Services (ACS). ACS is ultimately owned by Alice Houston, Wade Houston, and Johnson, through HJ Industries, and by Troha, through Seven T's. Wade Houston and Johnson's shares of HJ Industries, however, are placed in a blind voting trust represented by Alice Houston, who is the president and chief executive officer of ACS and controls Safety Carrier.

In December 1995, Teamsters and Active, through Johnson, entered into the Agreement, which provides in relevant part as follows:

> This Work Preservation Agreement (the "Agreement") is made and entered into . . . by and among (1) the undersigned employers party to the 1995–1999 National Master Automobile Transporters Agreement (the "NMATA") . . . (hereinafter referred to as ("Employer"), (2) the Employer's corporate parent Active Transportation Company ("Active") (hereinafter referred to as "Parent"), which controls or maintains the right to control Safety Carrier, Inc. ("Safety Carrier") and (3) the undersigned Local Unions affiliated with the International Brotherhood of Teamsters that are parties to the NMATA . . . and the Teamsters National Committee Transporters Industry Negotiating Committee ("TNATINC") (hereinafter collectively referred to as "Union").
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> 1. Parent, Union and Employer enter into this Work Preservation Agreement for the purpose of protecting and preserving Carhaul Work for the Employer's bargaining unit employees, eliminating contracting and double breasting practices under which Parent or Employer permit persons other than Employer's bargaining unit employees to perform

[1] Because we find that the parties' Agreement is not unlawful on its face, we find it unnecessary to pass on Teamsters' exceptions to the judge's rejection of certain exhibits and his denial of Teamsters' motion to reopen the record for evidence related to the parties' negotiation of the new work preservation agreement.

[2] Active was formed after the four-named individuals purchased the stock of Jupiter Transportation Company, using the assets of the companies they owned as collateral.

Carhaul Work, and preventing any scheme or subterfuge to avoid the protection and preservation of Carhaul Work under this Agreement.

. . . .

3. Parent and Employer agree that neither Parent nor Employer shall permit any Controlled Affiliate other than Employer to perform any Carhaul Work and that no Carhaul Work shall be performed by any Controlled Affiliate other than Employer except as permitted in paragraph 4 herein.

4. As a narrow exception to paragraphs 1, 2, and 3 above, the parties agree that Parent may permit Safety Carrier, a controlled affiliate, to perform Carhaul Work at its current facilities, so long as Safety Carrier complies with the following separate and independent additional restrictions: (a) it may only operate from its current facilities . . .; (b) it may not employ more than 115 drivers . . .; (c) it may not bid for, perform or seek to perform any carhaul contract presently, formerly, historically or hereafter performed by Employer or any other signatory to the NMATA under any circumstances . . . .

. . . .

11. . . . a. *Carhaul Work.* The term "Carhaul Work" means and includes any and all present work and future work opportunities of the kind, nature and type currently, historically or traditionally performed by the Employer's bargaining unit employees in connection with the over-the-road transportation of motor vehicles. . . . The parties agree and confirm that "Carhaul Work" is not limited to the specific work assignments presently, historically and hereafter performed by the Employer's bargaining unit employees but also includes any and all future work opportunities that are identical or similar in nature to such work and that the Employer's bargaining unit employees have the necessary skills and ability to perform.

b. *Controlled Affiliate.* Any person or entity shall be deemed to be a "Controlled Affiliate" of Parent and/or Employer if Parent or Employer, whether directly or indirectly through common ownership or common management owns a majority ownership or majority voting interest in such entity and (i) maintains the power, right or authority to control, manage or direct such entity's day-to-day operations, or (ii) maintains the power, right or authority to assign, or direct the assignment, or veto or block the assignment of Carhaul Work to such entity, or to prevent such entity from performing Carhaul Work.

On December 20, 1995, Teamsters Local 654 filed a grievance seeking enforcement of the Agreement. Machinists sought unsuccessfully to intervene in the impending arbitration. The grievance was denied at arbitration on procedural grounds. Machinists filed the charge in the instant proceeding on June 28, 1996, alleging that the Agreement is unlawful under Section 8(e).

The amended complaint alleges that Teamsters entered into, and Local 654, as its agent, maintained and gave effect to, an agreement that Active would not do business with another employer or person, including Safety Carrier.[3] We hold that, on this record, the Agreement is not unlawful, and we dismiss the complaint.

II. DISCUSSION

A. Framework for analysis under Section 8(e)

Section 8(e) prohibits parties from entering into an agreement under which the employer agrees to refrain from or cease doing business with another.[4] The Supreme Court, in *National Woodwork Mfrs. Assn. v. NLRB,*[5] held that, in enacting Section 8(e), Congress did not intend to prohibit agreements to preserve for unit employees work they have traditionally performed. Rather, the Court found that Section 8(e) prohibits only those agreements with a secondary purpose, i.e., those directed at a neutral employer or entered into for their effect on another employer.[6] The Court found that the relevant inquiry is

> whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the [agreement was] tactically calculated to satisfy union objectives elsewhere. . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees.[7]

[3] At the hearing, counsel for the General Counsel stated on the record that the grievance filed by Local 654 was not alleged to be an unfair labor practice. Counsel for the General Counsel further stated that the complaint recited the facts pertaining to the grievance only to show that Machinists' charge was timely filed.

[4] Sec. 8(e) states in relevant part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore containing such an agreement shall be to such extent unenforceable and void.

[5] 386 U.S. 612, 635 (1967).

[6] Id. at 632.

[7] Id. at 644.

In *NLRB v. Longshoremen ILA,*[8] the Court amplified its decision in *Woodwork Mfrs*. by setting out two tests to determine the lawfulness of a work-preservation agreement. "First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called 'right of control' test . . . ."[9] The Court further explained that "[t]he rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work."[10]

The Board set out its method of examining agreements under Section 8(e) *in General Teamsters Local 982 (J. K. Barker Trucking Co.)*.[11] In that case, the Board stated:

> [I]f the meaning of the clause is clear, the Board will determine forthwith its validity under 8(e); and where the clause is not clearly unlawful on its face, the Board will interpret it to require no more than what is allowed by law. On the other hand, if the clause is ambiguous, the Board will not presume unlawfulness, but will consider extrinsic evidence to determine whether the clause was intended to be administered in a lawful or unlawful manner. In the absence of such evidence, the Board will refuse to pass on the validity of the clause.[12] [Emphasis added.]

B. Analysis

1. Scope of the complaint

As noted above, the complaint in this proceeding alleges that the Agreement is unlawful under Section 8(e) of the Act, because it prevents Active from doing business with another employer or person, including Safety Carrier. The complaint does not allege that the grievance filed by Local 654 was unlawful or that Teamsters or Local 654 have attempted to enforce the Agreement in any manner violative of Section 8(b)(4)(B).[13]

Thus, only Section 8(e)'s strictures as to the content of work-preservation agreements are involved. Under the principles set out in *ILA* and *J. K. Barker*, we find that the Agreement executed by Active and Teamsters is not unlawful. For the reasons discussed below, we find that the meaning of the Agreement is clear, and that it is not clearly unlawful on its face because it satisfies both the work preservation and the right of control tests of *ILA*.

2. Objective of the Agreement

In determining that the parties' Agreement is unlawful, the judge found that "paragraphs 3 and 4 of the Agreement do not address preservation of work that is generically performed by members of a particular union (here the Teamsters) [but instead] seek to limit current and future work performed by employees of a specific single employer that are represented by a union other than Teamsters." The judge further found that "the Agreement includes language so broad as to prevent Safety Carrier from engaging in any work regardless of whether Active Transportation employees traditionally performed that work."

In excepting to the judge's finding, Teamsters asserts that the Agreement provides no evidence of any motive other than the preservation of work for bargaining unit employees, and that there is no pressure placed on Safety Carrier to sign a collective-bargaining agreement with Teamsters. In addition, Teamsters argues that the work addressed encompasses that traditionally performed by bargaining unit employees, as well as future opportunities that are fairly claimable as unit work.

Paragraph 1 states the objective of the Agreement as follows: "protecting and preserving Carhaul Work for the Employer's bargaining unit employees, eliminating contracting and double breasting practices . . . and preventing any scheme or subterfuge to avoid the protection and preservation of Carhaul Work under this Agreement." Paragraph 11a. defines Carhaul Work as "any and all present work and future work opportunities of the kind, nature and type currently, historically or traditionally performed by the Employer's bargaining unit employees." By paragraph 3, Active agrees not to permit a controlled affiliate to perform the covered carhaul work.

The above provisions explicitly manifest an objective to protect unit work from encroachment by *controlled affiliates*. This objective is underscored by the definition of the work covered by the Agreement. As the Supreme

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[8] 447 U.S. 490 (1980).

[9] Id. at 504.

[10] Id. at 504–505.

[11] 181 NLRB 515 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971).

[12] Id. at 517 (fns. omitted).

[13] See fn. 3, supra. In contrast to the analysis of agreements under Sec. 8(e), when a complaint alleges that a union's conduct in support of such an agreement violates Sec. 8(b)(4)(B), the Board will find a violation if the actual conduct of the union demonstrates a secondary purpose or takes place in circumstances in which the primary employer has no right of control over the work sought. *NLRB v. Pipefitters Local 638,* 429 U.S. 507, 517–518 (1977). In these cases, the lawfulness of the agreement provides no defense to the union's secondary conduct. In *NLRB v. Pipefitters Local 638*, the Court stated:

> The substantial question before us is whether, with or without the collective-bargaining contract, the union's conduct at the time it occurred was proscribed secondary activity within the meaning of [Section 8(b)(4)(B)]. If it was, the collective-bargaining provision does not save it. If it was not, the reason is that § 8(b)(4)(B) did not reach it, not that it was immunized by the contract. Thus, regardless of whether an agreement is valid under § 8(e), it may not be enforced by means that would violate § 8(b)(4). [Id. at 520–521.]

Court found in *ILA*, "the first and most basic question is: What is the 'work' that the agreement allegedly seeks to preserve?"[14] Provisions directed at protecting the traditional work of the bargaining unit suggest a primary rather than secondary purpose. The Agreement in this case expressly pertains only to carhaul work of the type performed by bargaining unit employees under the collective-bargaining agreement. This work is protected by prohibiting the signatory employer from redirecting that work to employees outside the unit. Moreover, the Agreement does not influence the labor relations of any other employer with respect to its own employees, for example, by requiring a neutral employer to enter into a contract with Teamsters.

Paragraph 4 contains specific conditions under which Active may permit Safety Carrier, which is identified as a controlled affiliate of Active, to perform the protected unit work. This paragraph places limitations on the number of Safety Carrier facilities and drivers, and prohibits Safety Carrier from performing any specific carhaul contract "formerly, historically or hereafter performed" by Active or any other NMATA signatory employer.

Contrary to the judge, we do not find that these provisions, as they relate to Safety Carrier, are in any way inconsistent with the express work-preservation purpose of the Agreement. Paragraph 4 states that, as an exception to the general prohibitions contained in the previous paragraphs, Active may, under certain conditions, continue to permit Safety Carrier to perform carhaul work of the type sought to be preserved for unit employees. These restrictions, which limit Safety Carrier to its current facilities and to a specific number of employees, reasonably support the goal of protecting unit work from possible encroachment by an expanding Safety Carrier.

Similarly, prohibiting Safety Carrier from bidding on carhaul contracts performed by Active or other NMATA signatories simply prevents Active from redirecting work previously performed by unit employees under specific contracts to employees outside the unit. We do not agree with the judge's finding that the Agreement prevents Safety Carrier from performing work regardless of whether the work had previously been done by Active or by employees represented by Teamsters. The provision on its face applies to work that, by the time of the potential bid by Safety Carrier, has already been performed by unit employees or work that is identical or similar in nature to such work. Although this restriction, as the judge found, could have the effect of limiting the current and future work of Safety Carrier's employees represented by Machinists, it demonstrates no purpose other than the stated work-preservation goal, and thus does not render the Agreement invalid.[15]

[14] *ILA*, supra at 505.

3. Right of control

The judge found that, because the Agreement specifically prohibits Safety Carrier from engaging in Active's unit work, the validity of the Agreement under the right of control test depends on whether Active controls the work of Safety Carrier's employees. Finding that Active does not have a right to control Safety Carrier, the judge concluded that the Agreement is unlawful.[16]

Contrary to the judge, we find it unnecessary to determine in this case whether Active in fact controls Safety Carrier. Applying the principles set forth in *J.K. Barker*, supra, we find that the meaning of the Agreement is clear on its face and that it involves only work under Active's control. Thus, the provisions of the Agreement are not ambiguous, and we find it unnecessary to resort to extrinsic evidence as to the circumstances surrounding the parties' inclusion of those provisions or the actual exercise of control by Active.[17]

The Agreement states expressly that "Active Transportation . . . controls or maintains the right to control" Safety Carrier. The meaning of this statement is clear, i.e., the parties agreed that Active controls Safety Carrier and thus the work performed by Safety Carrier. Paragraph 4 also refers to Safety Carrier as "a controlled affiliate" of Active, and imposes conditions under which Active may "permit" Safety Carrier to perform the carhaul work otherwise preserved for unit employees.

Moreover, paragraph 11b defines "controlled affiliate" to apply only where Active has majority ownership or majority voting interest in another business entity and "maintains the power, right or authority to control, manage or direct such entity's day-to-day operations, or . . . to assign, or direct the assignment, or veto or block the assignment of Carhaul Work to such entity, or to prevent such entity from performing Carhaul Work." Thus, the

[15] See *Pipefitters*, supra at 526 (no violation of Sec. 8(b)(4)(B) where cease-doing-business consequences are incidental to primary activity); *National Woodwork Mfrs.*, supra at 644–646 (product boycott requirement to preserve unit work does not violate Sec. 8(e)).

[16] In its exceptions, Teamsters contends that Safety Carrier is a controlled affiliate of Active, arguing that the companies are intertwined and that control is maintained through a variety of leases and service agreements, centralized administrative functions, consolidation of financial reports, and cross-collateralization of equipment, as well as by their ownership by the same individuals. In response, Machinists argues that Safety Carrier is not a controlled affiliate of Active, asserting that the evidence does not show any actual control or transfer of work from Active to Safety Carrier, and citing administrative and leasing agreements with others as well as the credited testimony of Alice Houston.

[17] *J. K. Barker*, supra; see also *Carpenters District Council of Northeast Ohio (Alessio Construction)*, 310 NLRB 1023, 1026 (1993) (reliance on extrinsic evidence improper except to resolve ambiguity).

Agreement is facially clear and satisfies the right of control test of *ILA*.

Our finding in this regard is consistent with Board precedent. For example, in *Painters District Council 51 (Manganaro Corp., Maryland)*,[18] the Board found lawful on its face a work-preservation clause that required the application of the collective-bargaining agreement when unit work was performed by the signatory employer directly or through another entity where the employer "exercises . . . management, control, or majority ownership. . . ." The Board found that the clause met the right of control test, because it did not apply to affiliations such as a parent-subsidiary relationship or minority ownership, which alone do not demonstrate control.

In *Alessio Construction*,[19] by contrast, the Board considered a contract provision requiring in essence that if partners, stockholders or beneficial owners participated in the formation of another company engaging in the same or similar business or employing the same or similar classifications of employees, the new business would be covered by the contract. With respect to the right of control, the Board found that, by applying to companies bound to the signatory solely by common ownership, rather than only to those over which the signatory had a right of control, the agreement unlawfully reached employers that were neutrals in terms of labor relations. The Board therefore concluded that the agreement facially violated Section 8(e).

By its terms, the Agreement here pertains exclusively to entities in which Active has majority ownership or majority voting interest, as well as a right to control day-to-day operations or work assignments. Like *Manganaro*, this Agreement facially requires more than common ownership and does not extend to related employers that are neutrals under the Act.

The Board in *Manganaro* also noted that the clause by its terms applied only where the signatory "exercises" control. The Board found that this indicated "more than potential authority; it refers to actual or active control of the work."[20] Likewise, in the instant case, we find that the statement in the Agreement that Active "controls or maintains the right to control" Safety Carrier, as well as the restrictive definition of controlled affiliate, facially denote actual control, as opposed to potential control based on mere affiliation.

C. Conclusion

We conclude that the Agreement in this proceeding is not unlawful on its face because, in accordance with the two tests set out in *ILA*, it expresses a primary purpose to preserve bargaining unit work for unit employees, and it applies by its terms only to affiliates over which Active has a right of control. Under the analysis *of J. K. Barker*, therefore, we "interpret [the Agreement] to require no more than what is allowed by law."[21] Accordingly, we find that Teamsters has not violated Section 8(e) as alleged, and we dismiss the complaint.

ORDER

The complaint is dismissed in its entirety.

CHAIRMAN HURTGEN, dissenting.

I do not agree that the clauses herein are lawful on their face.

1. The clause regulates the labor relations of a separate employer

The agreement here is between the Employer (Active) and the Union. In relevant part, it pertains to the work practices of another entity (Safety). Of course, if Active and Safety are a single employer, there would not be two separate employers, and thus there would not be a Section 8(e) violation. However, the test for single-employer status is a four-part test: common ownership, common management, interrelation of operations, and common control of labor relations.[1] The instant clause applies if there is common ownership *or* common management. In addition, the clause is silent as to interrelation of operations. Finally, the clause operates if there is a mere right to control the other entity's operations, as distinguished from actual control of such operations. In this regard, the Board had held that, in order for a clause to be valid, the signatory must have actual or active control of the work, not just potential control.[2]

In sum, the clause, on its face, is not restricted to the "single employer" situation. Further, at the very least, the clause is unclear, and the extrinsic evidence shows that, in fact, Active and Safety are not a single Employer. The judge so found, I agree, and my colleagues do not disagree.

2. The clause is not restricted to unit work.

The clause, on its face, is not restricted to unit work, i.e. work performed by Active's employees. The clause says that it "is not limited to the specific work assignments presently, historically and hereafter performed by the Employer's bargaining unit employees." Further, it includes work that is simply "similar in nature" to that

[18] 321 NLRB 158 (1996).
[19] Supra, 310 NLRB 1023.
[20] 321 NLRB at 164.
[21] 181 NLRB at 517.
[1] *Dow Chemical Co.*, 326 NLRB 288 (1998). See also *Alessio Construction*, 310 NLRB 1023 (1993). See also my dissent in *Mfg. Woodworkers*, 326 NLRB 321 (1998).
[2] *Painters District Council No. 51 (Manganaro Corp.)*, supra.

work. In addition, the clause is not restricted to work performed by Active. It applies to work performed by any other signatory to the National Motor Automobile Transportation Agreement (NMATA).[3] Finally, at the very least, the clauses are not free from ambiguity. My colleagues therefore err by refusing to consider extrinsic evidence on the point.

Based on the above, I disagree that the clause is a lawful "work preservation" clause.

Robert G. Levy II, Esq., for the General Counsel.
Kurt C. Korbelt, Esq. (Madison, Wisconsin & Ernest B. Orsatti, Esq.), of Pittsburgh, Pennsylvania, for the Respondent.
Christopher T. Corson, Esq., of Upper Marlboro, Maryland, for the Charging Party.
James F. Wallington, Esq., of Washington, D.C., for the Intervenor.
C. John Holmquist Jr., Esq., of Farmington Hills, Michigan, for the Employer.
Martin J. Klaper, Esq., of Indianapolis, Indiana, for Safety Carrier.
F. Larkin Fore, Esq., of Louisville, Kentucky, for Automotive Carrier Services.

DECISION

STATEMENT OF THE CASE

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on February 16 and 17 and April 19 and 20, 1999,[1] in Houston, Texas. The charge was filed on June 28, 1996. An amended complaint (complaint or amended complaint) issued on May 27, 1998.

All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Upon consideration of the entire record[2] and briefs filed by Respondent, Charging Party (Machinists Union), Active Transportation Company and the General Counsel, I make the following findings.

I. JURISDICTION

The Employer (Active Transportation Company) is a general partnership with it principal offices in Louisville, Kentucky, where it is in the business of transporting newly manufactured automobiles and heavy-duty trucks in interstate commence. During the 12 months previous to the filing of the amended complaint the Employer derived gross revenues in excess of $50,000 from the transportation of freight between various States and outside Kentucky.

Safety Carrier, Inc. is a Texas corporation with its principal office in San Antonio, Texas where it is in the business of hauling cars from railheads and plants. During the 12 months previous to the filing of the Amended Complaint Safety Carrier derived gross revenues in excess of $50,000 from the transportation of cars between various States and outside Texas.

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[3] There is no showing that the Employer is a member of a multiemployer unit.

[1] After the hearing closed, on July 1, 1999, Respondent moved to reopen the hearing. General Counsel, Charging Party, Active Transportation Company, and Automotive Carrier Services Co. (Safety Carrier, Inc.) filed oppositions to that motion. Respondent alleged that it and employers including Active agreed to a new Work Preservation Agreement in June 1999, which is effective from June 1, 1999, until May 31, 2003. I have reviewed Respondent's motion, the supporting brief and an affidavit, and I find nothing which would render this matter moot or which would justify a determination of newly discovered evidence. Therefore Respondent's motion is denied.

[2] Following close of the hearing and in accord with my direction during the hearing, Respondent filed an explanation of relevance of its Exhs. 2 through 17. General Counsel and Charging Party responded. Upon consideration I shall not reverse my decision to receive those documents in evidence. Charging Party argued those exhibits fall within the prohibitions of the hearsay rule and are inadmissible. However, an examination of the record shows there was no timely objection based on hearsay. The hearsay rule deals with the competence of evidence. As to competence the sole question here is one of authenticity (i.e., were R. Exhs. 2–17 business records or summaries of business records (Rule 1006 FRE). Here, there was agreement that R. Exhs. 2–17 were business records or summaries that Respondent received from Employer (Active Transportation) pursuant to subpoena. Those documents are admissible under Rules 803(6) and 1006, FRE. It is not necessary to call and examine witnesses where the relevant parties stipulate (Tr. 173–181; 485–490) to authenticity of business records (Sec. 102.40, NLRB Rules and Regulations). Charging Party also argued that some of those exhibits involve matters before the November 4, 1994, purchase of Jupiter Corp. Transportation and are irrelevant. As shown herein, General Counsel argued that the question of control involves the role of Active Transportation and Safety Carrier from December 1995 when Active became a party to a work preservation agreement. As shown herein I find that the Jupiter purchase resulted in a change in the interrelationship of corporations involved herein including Active Transportation and Safety Carrier. Therefore, exhibits that demonstrate the relationship of those corporations before November 1994 may not be determinative of their relationship at relevant times. However, my decision in that regard was not apparent during the hearing and R. Exh. 2–17 were relevant to Respondent's defense.

Respondent also asked for reconsideration of the rejection of R. Exhs. 18–21. I rejected those exhibits on failure to show relevancy. The General Counsel alleged that the four documents are between 8 and 10 inches thick. Respondent agreed those exhibits are 7-1/2 inches thick and include three large hardbound volumes and a note agreement. After consideration of the motion and opposition, I reverse my earlier decision and receive in evidence only portions of R. Exhs. 18–21 shown by Respondent in its motion as follows: At par. 24 of its motion Respondent cited schedule 8.8 to R. Exh. 18 as showing that Charlie Johnson is compensated as CEO of Active, Alice Houston is compensated as CEO of ACS, Wade Houston is compensated as CEO of Dallas & Mavis and Dennis Troha is compensated as CEO of ATC Leasing (Note: I receive that evidence but do not receive any evidence showing specific amounts of compensation). At par. 25 Respondent cited schedule 8.11 of R. Exh. 18 entitled "Transactions with Subsidiaries and Affiliates," as setting forth the master equipment leases. At par. 27 Respondent cited R. Exh. 21 as the subordinated note agreement between the four individuals on behalf of their respective companies and Northwestern Mutual Life Insurance. Respondent failed to show with specificity other matters included within its motion. I find that Respondent has failed to demonstrate specific relevancy beyond what is shown above except to the extent of showing some facts which have already been stipulated in evidence or otherwise shown through credited evidence. It is not necessary to receive matters showing facts not in dispute. Therefore, in all respects other than what is specified above, I reject R. Exhs. 18–21.

Respondent admitted that Active Transportation and Safety Carrier have been employers at material times within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATIONS

Respondent admitted that Association of Machinists and Aerospace Workers; Teamsters National Automobile Transporters, Industry Negotiating Committee, International Brotherhood of Teamsters, AFL–CIO (Committee); and General Teamsters Sales and Service and Industrial Union Local No. 654, a/w International Brotherhood of Teamsters, AFL–CIO (Intervenor) have been labor organizations within the meaning of Section 2(5) of the Act, at all material times.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS[3]

The General Counsel alleged that even though Active Transportation does not control Safety Carrier, Respondent[4] entered into a work-preservation agreement with Active Transportation in December 1995. The work-preservation agreement reads:

> This Work Preservation agreement (the "Agreement") is made and entered into in accordance with Section 301 of the Labor Management Relations Act, 28 U.S.C. Section 185, by and among (1) the undersigned employers party to the 1995–1999 National Master Automobile Transporters Agreement (the "NMATA") as identified in Article 1, Section 1 of the NMATA and/or applicable Supplemental Agreements (hereinafter referred to as ("Employer"), (2) The Employer's corporate parent Active Transportation Company ("Active") (hereinafter referred to as "Parent"), which controls or maintains the right to control Safety Carrier, Inc. ("Safety Carrier") and (3) the undersigned Local Unions affiliated with the International Brotherhood of Teamsters that are parties to the NMATA as identified in Article 1, Section 2 of the NMATA and the Teamsters National Committee Transporters Industry Negotiating Committee ("TNATINC") (hereinafter collectively referred to as "Union"). . . .
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> 1. Parent, Union and Employer enter into this Work Preservation Agreement for the purpose of protecting and preserving Carhaul Work for the Employer's bargaining unit employees, eliminating contracting and double breasting practices under which Parent or Employer permit persons other than Employer's bargaining unit employees to perform Carhaul Work, and preventing any scheme or subterfuge to avoid the protection and preservation of Carhaul Work under this Agreement.
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> 2. Parent and Employer agree that neither Parent nor Employer shall undertake to, or permit any Controlled Affiliate (including freight broker companies) to, subcontract, transfer, lease, divert, contract, assign or convey, in full or in part, any Carhaul Work to any Controlled Affiliate, plant, business, person or non–unit employees other than Employer, or to any other mode of operation, except as explicitly and specifically provided for and permitted in the NMATA and/or applicable Supplemental Agreements.
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> 3. Parent and Employer agree that neither Parent nor Employer shall permit any Controlled Affiliate other than Employer to perform any Carhaul Work and that no Carhaul Work shall be performed by any Controlled Affiliate other than Employer except as permitted in paragraph 4 herein.
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> 4. As a narrow exception to paragraphs 1, 2, and 3 above, the parties agree that Parent may permit Safety Carrier, a controlled affiliate, to perform Carhaul Work at its current facilities so long as Safety Carrier complies with the following separate and independent additional restrictions: (a) it may only operate from its current facilities in Atlanta, Georgia; San Antonio, Texas; Indianapolis, Indiana; and the metropolitan area of Dallas, Texas; (b) it may not employ more than 115 drivers for the facilities set forth above; (c) it may not bid for, perform or seek to perform any carhaul contract presently, formerly, historically or hereafter performed by Employer or any other signatory to the NMATA under any circumstances . . . . [GC Exh. 2.]

Teamsters Local 654 sought to enforce that agreement through a grievance. Roy Atha is the principal officer for Teamsters Local 654 in Springfield, Ohio. Atha testified that he filed a December 20, 1997 grievance seeking enforcement of the work-preservation clause.

Merrill Frost is the automotive coordinator for the Machinists Union. He first learned of the Atha grievance in January 1996.[5] Upon learning that grievance was going to arbitration the Machinists moved to intervene (GC Exh. 22). The response to that request was received in evidence (GC Exh. 23).

The grievance continued through arbitration where it was denied.

This controversy involves several partnerships and corporations. A November 1994 purchase of Jupiter Transportation Company is of particular significance. Following that purchase several corporations or partnerships were set up in the manner described in the chart received in evidence as General Counsel's Exhibit. 6.

The employers of primary concern are Active Transportation Company and Safety Carrier, Inc.

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[3] The facts shown herein are not in dispute unless shown to the contrary in this decision. In many instances the parties agreed to stipulations and in many instances testimony and records were not disputed. To the extent there are conflicts in evidence I have made credibility determinations in the conclusions.

[4] Respondent attorney Kurt Kobelt admitted that Respondent demanded the "red-circle" of Safety Carrier during its 1995 negotiations with Active Transportation (Tr .431, 432). Kobelt explained that red-circle meant that the Safety Carrier operations were limited to those identified as existing at the time of the agreement (Tr 432). However, as shown herein, the work preservation agreement also extends to the future business of Active Transportation (GC Exh. 2, par. 4).

[5] Respondent contended among other things, that the allegations are barred by Sec. 10(b) (see GC Exh. 1(q)). The testimony of Merrill Frost is undisputed that the Charging Party first learned of the work preservation agreement in January 1996. The charge was filed on June 28, 1996. Since that is within 6 months of Charging Party's first knowledge I find that the complaint is not barred by Sec. 10(b) of the Act.

The other three affirmative defenses in Respondent's answer were not supported by substantial evidence and are rejected.

Respondent wrote Charlie Johnson, "President, Active Transportation Company" on February 24, 1995, requesting information in regard to "the Work Preservation Agreement." Active Transportation Company, through its Executive VicePresident Gordon Birdsall replied to Respondent on May 3, 1995.[6]

Active Transportation's May 3 letter set out a number of matters which are of significance in this proceeding. At page 2 and continuing, of Active's response to Respondent's February 24 request for information, is the following:

> As an overview to the response hereinafter set forth Active, subject to qualification, offers the following historical perspective to delineate itself from the Jupiter entities. Johnson-Houston Corporation (JHC) is a Kentucky corporation and a certified minority business enterprise. JHC is owned by Charlie W. Johnson and A. Wade Houston. Charlie W. Johnson is the Chairman and President of JHC. JHC through its affiliate Active Acquisition Corp. acquired the stock of Jupiter Transportation Company. The name of Jupiter Transportation Company was initially changed to JCTS but has now been changed again to Active Corp. Transportation System to avoid confusion. Jerrold Wexler (now deceased) owned a super majority of the stock of Jupiter Industries, the parent of the Jupiter entities. Jupiter Industries was a diversified holding company. Jupiter Industries owned Jupiter Corporation which in turn owned JCTS as well as other companies. Transport Venture, Inc. was a wholly owned subsidiary of JCTS. JHC and Transport Venture, Inc. formed a partnership called Active Transportation Company (Active). Active is a Kentucky partnership and it is a certified minority business enterprise. JHC owned 60% of Active and Transport Venture, Inc. owned 40%. Active's business was and is that of a public transporter. After the death of Jerrold Wexler, JHC was offered the right to purchase the 40% non–controlling interest of Active held by Transport Venture, Inc. JHC was also offered the right to purchase certain assets and entities from certain of the Jupiter entities.
>
> These transactions created Active as currently constituted and as more fully set forth below. It is this Active which is the largest minority business enterprise operating as a public transporter and which assumed responsibility for the obligations and benefits of the NMATA including the work preservation provisions. . . .

Active's letter continues to set forth the relationships as existing before the (Jupiter) acquisition in 1994. Among those responses was the following:

> 6. Automotive Carriers Services (ACS) (called Automotive Carriers Services Inc. in the Request) is an independently owned and operated Kentucky partnership. Alice K. Houston was its sole director, President and CEO.

Active goes on to set out the relationships as existing after the (Jupiter) acquisition in 1994. Among those responses was the following:

> 3. . . . . Active was reorganized and the beneficial ownership of Active is held indirectly by majority owner, Johnson–Houston Corporation (66 2/3%) and by minority owner, Seven T's Corp. (33 1/3%).
>
> . . . .
>
> 5. ACS continued to exist as a Kentucky general partnership.
>
> 6. HJ Industries, Inc. continued to exist as a Kentucky corporation.
>
> 7. Joint Venture Transportation, Inc.'s minority interest in ACS was redeemed by ACS in connection with an acquisition. Active does not know what the Jupiter entities did with Joint Venture Transportation, Inc. after the redemption.
>
> 8. Unimark Services, Inc. and Safety Carrier, Inc. continued to be wholly owned subsidiaries of ACS.
>
> 9. ACS acquired the stock of Auto Truck Transport Corp.
>
> 10. HJT Specialized Carrier Co. changed its name to Dallas & Mavis Specialized Carrier Co.

Active's response continued at page 11, response no. 3:

> Active, Active Corp. Transportation System, Inc., Dallas & Mavis Forwarding Co., Inc., Kenosha Auto Transport Corp., Provincial American Truck Services, Inc. and Provincial American Truck Transporters, Inc. are the entities set forth in paragraph 1 of the Request which perform, control, bid for, or assign work of the kind, nature and type covered by the NMATA. Those companies are either signatory to the NMATA or have assumed responsibility for the NMATA.

At page 13 of its response Active asserts that it is not the parent of Safety Carrier, Inc., Auto Truck Transport Corp. or Automotive Carrier Services, Inc. Then, at page 14, is the following:

> Active has been sensitive since the threat to block its acquisition of charges of double breasting or violation of the Work Preservation Agreement. Charlie Johnson as the president of Active has taken steps to avoid impropriety and the appearance of impropriety arising out of his indirect ownership of unrelated entities to which this inquiry is improperly directed. As a practical matter neither Active nor Charlie Johnson or Gordon Birdsall participates in the affairs of these entities (Safety Carrier, Inc., Auto Truck Transport Corp. and Automotive Carrier Services, Inc.). As a legal matter, Charlie Johnson's indirect ownership interest is held in a blind voting trust by which he has given up all right to control these entities or to know or have access to information to which a shareholder would ordinarily be entitled. Accordingly, if additional information is required regarding these entities, I suggest you contact Alice Houston, who is my trustee under the Voting Trust.

[6] Among other things, Active Transportation wrote Respondent regarding inter alia, matters after November 1994, that its CEO Charlie Johnson has "taken steps to avoid impropriety and the appearance of impropriety arising out of his indirect ownership . . . Charlie Johnson's indirect ownership is held in a blind voting trust by which he has given up all right to control . . . I suggest you contact Alice Houston, who is . . . trustee under the Voting Trust (Active Exh. 3). See Employer Active's Exhs. 2 and 3 (Active 2 and 3).

An ACS attorney wrote Respondent agent Kurt Kobelt on May 12, 1995. Among other things that attorney, F. Larkin Fore, wrote:

> Safety Carrier, Inc. (SCI) is a wholly owned subsidiary of ACS. Auto Truck Transport Corp. (ATT) is a wholly owned subsidiary of ACS. . . . . ACS which is a Kentucky general partnership. Its partners are ACS Holding Company (ACSHC) which owns a 99% interest and ACS Investor Co. (ACSIC) which owns 1%. Both ACSHC and ACSIC are Kentucky general partnerships. The partners of ACSHC are HJ Industries, Inc. (HJI) which owns 66 2/3"% and Seven T's Corp. (STC) which owns 33 1/3% of ACSHC. HJI is a Kentucky corporation owned by Alice K. Houston (25%), A. Wade Houston (25%) and Alice K. Houston, Trustee, Trustee under a Blind Voting Trust (50%). The beneficial owner of the trust is Charlie W. Johnson. STC is a Wisconsin corporation owned by Dennis M. Troha. ACSIC is owned by HJI (66%), STC 33% and AWH Corporation (1%) (AWHC). AWHC is solely owned by A. Wade Houston.
>
> The sole director of ATT is Alice K. Houston. Forest Guest is president of ATT.
>
> Alice K. Houston is the President and CEO of ACS. As a partnership, ACS does not have a board of directors.
>
> Neither Dennis M. Troha, Charlie W. Johnson, A. Wade Houston nor Gordon Birdsall have any position in ACS, ATT or ACI. Gordon Birdsall has no direct or indirect financial or other interest in any of these entities. Alice K. Houston has no position with Active.

Charlie Johnson on behalf of Active Transportation entered into the contested work-preservation agreement with Respondent. As shown above, among other things, that agreement stated that Active Transportation controls or has the right to control Safety Carrier. According to record evidence including testimony by Charlie Johnson[7] as well as Alice Houston and documents including General Counsel's Exhibit 10, that disclosure was not true.

Active Holding Co. (99 percent) and Active Investing Co. (1 percent) own Active Transportation. Seven T's Corp. (33-1/3-percent) and Johnson–Houston Corp. (66-2/3-percent) own Active Holding Co. Dennis Troha is the 100-percent owner of Seven T's.[8] Wade Houston owns 50 percent and Charlie Johnson owns 50 percent of Johnson-Houston Corp.[9] Charlie Johnson is the president and CEO of Active Transportation.

Safety Carrier is held by ACS (Automotive Carrier Services) which is held by ACS Holding (99 percent), and ACS Investing Co. (1 percent). HJ Industries[10] (66-2/3 percent) and Seven T's Corp. (33-1/3 percent) own ACS Holding. As trustee and a shareholder in her own right, Alice Houston holds 100 percent interest in HJ Industries and by that interest, she holds a controlling interest in ACS Holding, ACS and Safety Carrier. Alice Houston is the president and CEO of ACS. She oversees the management of Safety Carrier with authority to make final decisions. Houston testified that no one has the authority to interfere with her running of ACS and Safety Carrier.[11]

Alice Houston testified that ACS is a minority enterprise that secures its business through competitive bids. After being invited to bid on a job involving transporting new automobiles, Safety Carrier may bid in competition with other car haulers. Those other car haulers may include Active Transportation, which is also a minority enterprise. Safety Carrier currently has locations in Haslet, Texas, where it transports Chrysler automobiles; at San Antonio, Texas, where it transports GM automobiles; and in Atlanta, Georgia, where it transports Ford Taurus, Subarus, and Jaguars. Safety Carrier's future is dependent on its success in competitive bidding in other locations as well as its continued success in outbidding others and maintaining its current business.

Although former Safety Carrier president Diane Chambers and current president, Forest Guest,[12] conducted day-to-day operations, Alice Houston has always directed those activities. Houston acts as CEO in overseeing Safety Carrier as a wholly owned subsidiary of ACS. Safety Carrier has had leasing agreements with a number of lessors[13] including ATC Leasing Company. Safety Carrier is in competition with all other car–haulers[14] and none of those car-haulers that are represented by

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[7] Charlie Johnson testified that his statement in the work-preservation clause that Active Transportation controlled Safety Carrier is not true. He testified that Active Transportation could not afford a strike and that he told that to Respondent and to his own negotiating committee (Tr. 322). Johnson told Respondent that he had no control over Safety Carrier. Charlie Johnson explained that Safety Carrier was in a blind trust, which had been set up in order to prevent him from having control over Safety (Tr. 325). Respondent's agent told Johnson that he would have to sign something with Safety Carrier in it if he wanted to deal (Tr ..326).

[8] Dennis Troha is the sole owner of Seven T's. Troha, through Seven T's, owns approximately a one-third interest in both Active Transportation and Safety Carrier through its interest in Active Holding and ACS Holding. Wade Houston owns approximately a one-third interest in Active Transportation through his interest in Johnson–Houston Corp. Charlie Johnson owns approximately a one-third interest in Active Transportation through his interest in Johnson-Houston Corp. Alice Houston does not hold a personal interest in Active Transportation.

[9] The parties stipulated that Charlie Johnson has been the chairman and managing partner of Johnson-Houston Corp. at all material times.

[10] Alice K. Houston, her husband A. Wade Houston and Charlie W. Johnson executed a Voting Trust Agreement (GC Exh. 10) on November 7, 1994. At the time of that agreement HJ Industries consisted of 1000 outstanding shares held by Charlie W. Johnson (500 shares), A. Wade Houston (250 shares) and Alice K. Houston (250 shares). By that instrument A. Wade Houston transferred his 250 shares and Charlie W. Johnson transferred his 500 shares, into the voting trust which was represented by its trustee Alice K. Houston. Alice Houston has continued as trustee at all material times.

[11] Charlie Johnson testified in full agreement with Alice Houston. He testified that he has had no authority over ACS or Safety Carrier (Tr. 328).

[12] Forest Guest has been the president of Safety Carrier since the end of 1996 or early 1997.

[13] Alice Houston testified that Safety Carrier leases equipment from Norlease, Ford Motor Credit, Navistar and P&C Band as well as ATC Leasing.

[14] Including both truckaway and driveaway operations. Truckaway involves operation of a tractor and trailer where the trailer is loaded with automobiles or trucks. Driveway includes piggyback arrangements where one truck transports one or more additional trucks that are tied together at the frames. The work preservation agreement at issue here deals with truckaway (also referred to as car-haul. Tr. 440).

the Teamsters Union has given business to Safety Carrier.[15] Indeed those corporations including Active Transportation Co. are in direct competition with Safety Carrier. Alice Houston testified that the day-to-day control rested in the officers of Safety Carrier and that she oversees their work. Her role "was primarily to set the strategy, strategic planning, to approve final expenditures and budgets, appropriations, and act as chief executive officer in overseeing wholly-owned subsidiary." No one else exercises or has the right to exercise actual control of Safety Carrier.

The Machinists Union organized Safety Carrier in 1987. That relationship has continued and Safety Carrier has a current collective-bargaining agreement with the Machinists (GC Exh. 21(a)).

Respondent attorney Kurt Kobelt testified that among other things he considered Safety Carrier's lease arrangement with ATC Leasing[16] in determining that Safety Carrier is controlled by Active Transportation. ATC Leasing is one of the companies included among the many companies organized after the purchase of Jupiter (see GC Exh. 6). That exhibit (GC Exh. 6) illustrates that ATC Holding Managing Partner owns 99-percent interest in ATC Leasing. ATC Holding Managing Partner is owned by Seven T's (1/3), HJ Industries (1/3) and Johnson–Houston Corp. (1/3). Alice Houston testified that Dennis Troha is the managing partner of ATC Leasing.[17]

Alice Houston testified that the various companies that flowed from the purchase of Jupiter did engage in cross-collateralization of stock in order to secure a significant loan. That collateralization was in addition to security required in separated loans by the various companies and involved only the highest level of the companies. Through the cross-collateralization, stock owned by individual companies is secured for the common loan[18].

[15] Alice Houston testified that the only exception to receiving or giving business to competitors may occur on a trip lease arrangement, which typically occurs during an overflow situation. An example of an overflow situation would be end of year fluctuations where a carrier does not have sufficient equipment to handle all its business. On some occasions Safety has arranged with a number of carriers including Wagoneer and Allied to handle its overflow hauls. Safety, as the carrier that gave up that particular business would take 10 percent and the carrier that makes the haul would take 90 percent, of the revenue.

[16] The ATC lease with Safety was received as R. Exh. 2. Respondent argued that lease is exactly the same as the agreement between ATC Leasing and Active and that Safety entered into its lease on the same day the Voting Trust was executed. However Respondent pointed to nothing in the lease and I am unable to find anything, which demonstrated that Active controls Safety.

[17] Alice Houston testified that ATC Leasing has no control in any fashion over Safety Carrier.

[18] Respondent did not dispute Alice Houston's testimony regarding cross-collateralization. Respondent argued that Charlie Johnson, Alice Houston, Wade Houston, and Dennis Troha formed an alliance in 1994, which allowed them to purchase Jupiter Corp. Systems and that the financing of that purchase involved cross-collateralization of all the assets of the companies owned by those four individuals. I agree with Respondent to the extent of involvement by the specific companies or other entities described throughout these proceedings and as set out in the chart identified in evidence as GC Exh. 6. The evidence did not show that those companies and entities were the only holdings of any of the four individuals.

[19] Kobelt also admitted that he received a May 12, 1995 memorandum from Larkin Fore, attorney for ACS and Safety Carrier. That memo stated, among other things, that Alice Houston was the majority stockholder of ACS and Safety Carrier through her own shock holding and her holding as trustee; that ACS has contracts with the Machinists Union; and that ACS perceives that the Teamsters negotiations with Active Transportation is aimed at limiting or ending ACS' trucking business (Active Exh. 6).

CONCLUSIONS

Credibility

In large measure the evidence was not in conflict. In many instances where there were conflicts I have stated my credibility determinations below in the section under findings. However, there were serious conflicts involving the following witnesses.

Kurt Kobelt was one of the attorneys that represented Respondent in these proceedings and in negotiations toward the work-preservation agreement. His testimony is significant and involves his knowledge of the interrelationship between the involved employers. Kobelt testified that he interpreted what Charlie Johnson told him to be that Johnson was willing to agree that he controlled Safety Carrier[19] (Tr. 459). I have carefully evaluated Kobelt's testimony and I find that I cannot credit his testimony to the extent it conflicts with credited evidence. His testimony as to his conclusions conflicts with documents that were in his possession before Respondent entered into the work-peservation agreement (e.g., Active Exhs. 3 and 6).

However, the record is not disputed regarding the contents of the work-preservation agreement. Charlie Johnson signed that agreement which includes statements regarding Safety Carrier. Due to conflicts between his testimony and the work-preservation agreement I am unable to fully credit Charlie Johnson.

Ronnie Green testified. Green is the president and business manager of Teamsters Local 512. Green testified that he attended a negotiating meeting when Gordon Birdsall was present. Birdsall represented Active Transportation but died around June 1995. I was impressed with Green's demeanor and I credit his testimony to the extent it does not conflict with credited evidence.

I was also impressed with the demeanor and testimony of David R. Parker. Parker was employed by Active Transportation in 1995 after February of that year. Mr. Parker was involved in some of the negotiation sessions regarding the work-preservation agreement and he signed some of the documents that were received in evidence regarding Safety Carrier. I credit Parker's testimony to the extent it does not conflict with other matters found herein.

I was most impressed with the testimony and demeanor of Alice Houston and I fully credit her testimony. I was especially impressed with her testimony regarding her control over Safety Carrier. That testimony was not rebutted by direct evidence. As shown above Charlie Johnson signed the work-preservation agreement, which included a statement that Active Transportation controlled Safety Carrier. However, there was no direct

evidence supporting those claims by Johnson and, of course, Johnson testified to the contrary during these proceedings. Moreover, Houston's testimony was in accord with documents received in evidence.

FINDINGS

The complaint alleges that Respondent engaged in conduct in violation of Section 8(e) of the Act by entering into and maintaining the work-preservation agreement with Active Transportation. Section 8(e) generally prohibits collective-bargaining agreements that require employers to cease doing business with any other person.

As shown above, the alleged primary employer in this instance is Active Transportation Company and the alleged work-preservation agreement would require Active to prevent the alleged secondary employer, Safety Carrier, doing business of a particular description. Unlike many controversies, this case does not involve double breasting. Both Safety Carrier and Active Transportation were union operations at material times.[20] As shown herein the Machinists represented Safety Carrier employees and the Teamsters represented Active Transportation employees.

Work-preservation agreements are not prohibited by the Act provided the agreement provides for the preservation of work traditionally performed by employees under the control of the primary employer.[21] Does the Agreement represent a lawful attempt to preserve traditional Teamsters Union work, or instead, is it "tactically calculated to satisfy the union objectives elsewhere"? *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612 (1967).

In this instance I must question whether the Agreement attempts to preserve work.[22] Does the agreement require Active Transportation to limit work of Safety Carrier without regard to whether work outside those limitations was ever performed by Active Transportation?

As shown above in paragraph 1 of the Agreement, its purported purpose is the preservation of carhaul work for the Employer's bargaining unit employees by among other things, eliminating contracting and double breasting practices.

In the first paragraph and in paragraph 4, as well as indirectly in paragraph 3, the parties address Safety Carrier. Paragraph 4 specifies that Safety Carrier may continue to operate only from previously established locations in Texas, Indiana and Georgia; that Safety Carrier may employ no more than 115 drivers; and that Safety Carrier may not seek any work formerly or hereafter performed[23] by the Active Transportation. Unlike the situations in *National Woodwork Mfrs. Assn. v. NLRB*, supra, and *NLRB v. Longshoremen ILA*, 447 U.S. 490, 505 (1980), paragraphs 3 and 4 of the Agreement do not address preservation of work that is generically performed by members of a particular union (here the Teamsters).[24] Instead those paragraphs seek to limit current and future work performed by employees of a specific single employer that are represented by a union other than Teamsters (i.e., Safety Carrier whose employees are represented by the Machinists Union).

The Supreme Court[25] has set forth a two-part test to determine the lawfulness of a work-preservation agreement:

> First, the agreement must have as its objective the preservation of work traditionally performed by employees represented by the union.
>
> Second, the contracting employer must have the power to give the employees the work in question (the so-called right of control test).

In consideration of whether the agreement had as its objective the preservation of work, I shall consider the obvious. Which work is addressed by the work-preservation agreement?[26] As shown above, the relevant portions of that agreement direct the primary employer to take action to prevent Safety Carrier from engaging in any work not permitted by the

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[20] Safety Carrier employees are represented by the Machinists Union. The Machinists has represented the Safety Carrier employees for longer than the Teamsters has represented employees of Active Transportation. As shown herein the Machinists has represented Safety Carrier since 1987. The Teamsters has represented Active Transportation since 1990.

[21] Respondent argued that regardless of whether Active controls Safety Carrier there was no violation of Sec. 8(e). If Active controls Safety the Agreement is permitted as a legal work preservation agreement. On the other hand, as argued by Respondent, if Active does not control Safety then the Agreement has no force or effect. Obviously, acceptance of that argument would render Sec. 8(e) meaningless. The courts and the Board have consistently held that a violation occurs if there is no right to control.

[22] See *Teamsters Local 982 (J. K. Barker Trucking Co.)*, 181 NLRB 515 (1970), affd. 450 F.2d 1322 (D.C. Cir. 1971); *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB 321(1998).

[23] Obviously, Safety Carrier cannot foresee all the work that will be hereafter performed by Active Transportation and NMATA. Therefore, compliance with the Agreement may require total avoidance of all future job quests even if Active actually controls job bidding by Safety Carrier. As shown above Safety Carrier secures its work through competitive bidding. From time to time a carhaul operator including Safety Carrier may lose a previously held contract through the bidding process. Under the terms of the Agreement if that loss of business is followed by an acquisition of that particular contract by a NMATA employer, Safety Carrier could not thereafter seek to reacquire that particular contract. Moreover, once NMATA acquires any particular job, under the Agreement Safety Carrier is permanently enjoined from procuring that particular work.

[24] Respondent argued there is no evidence that the Agreement had any objective but to protect jobs from double breasting or purposes testified to by Kurt Kobelt. Nevertheless, I note the Agreement includes both work preservation and work limitation. The work limitation is directed to Safety Carrier. Par. 4 of that Agreement shows that the Agreement seeks to limit the scope of Safety Carrier's work and there was no showing that that work limitation has a direct relationship with protection of work performed by Active (and NMATA) employees. Only in those instances where Active Transportation would receive a bid invitation and elect to bid, would there be any possibility of a benefit to Active's employees. The only benefit in that instance would be an increased probability of Active being successful in bidding in the absence of one of the bidding companies—i.e., Safety Carrier. In those circumstances there would be no work preservation unless the contract was previously held by Active Transportation. However, in that situation par. 4 would be unnecessary because work held by Active Transportation employees would be protected by pars. 1 and 2.

[25] *NLRB v. International Longshoremen ILA*, 447 U.S. 490 (1980).

[26] The Supreme Court stated "the first and most basic question is: What is the 'work' that the agreement allegedly seeks to preserve? '' Id.

agreement without regard to whether that work was traditionally controlled by Active Transportation or whether that work was traditionally performed by members of the Teamsters Union. Obviously, members of the Teamsters Union have traditionally worked as truckdrivers and it is safe to assume that any car haul operation would involve truck drivers. Nevertheless, the Agreement includes language so broad as to prevent Safety Carrier from engaging in any work regardless of whether Active Transportation employees traditionally performed that work. Instead it is concerned with limiting Safety Carrier's work.

The Court explained that where the objective was preservation of traditional work the method the parties chose to preserve that work may be incidental. *NLRB v. Longshoremen ILA*, 447 U.S. at 490, 505.[27] There the Court pointed to an earlier decision where the Court addressed the Carpenters union work of fitting doors installed at jobsites. The agreement in question provided for the boycott of all prefitted doors. See *National Woodwork Mfrs Assn. v. NLRB*, 386 U.S. 612 (1967). Nevertheless, the instant agreement presents a more difficult query.

The Board has recently had two occasions to consider work-preservation agreements. In *Painters District Council 51* (*Manganaro Corp.)*, 321 NLRB 158, 163 (1996), and in *Carpenters (Mfg. Woodworkers Assn.)*, supra, the Board found language not too dissimilar from the instant agreement's general language did not violate Section 8(e). The Board held that language intending to protect work of unit employees if controlled by the employer was not unlawful. In Manufacturing Woodworkers, the Board stated, "The crucial focus in analyzing whether the (work-preservation agreement) violates Section 8(e) is not whether, or to what extent, the signatory employer and the affiliated business entity are bound by common ownership. Rather, we find that the crucial focus is whether, as both the (work-preservation agreement and the work-preservation agreement in *Manganaro Corp.*) state, work of the type covered by the collective-bargaining agreement is being performed by a business entity over which the signatory employer exercises control."

Here, the agreement (WPA) extends beyond the pale outlined in *Manufacturing Woodworkers* and *Manganaro*. Unlike those work-preservation agreements, the instant agreement extends to a specific nonsignatory employer. In both the opening paragraph and in paragraph 4, the agreement specifies that it applies to Safety Carrier, Inc. In a departure from the acceptable agreements found in *Manufacturing Woodworkers* and *Manganaro*, the instant agreement prohibits a specific employer from engaging in any Active Transportation work[28] including work Active Transportation may perform in the future:

> 4. . . C. Safety Carrier may not bid for, perform or seek to perform any carhaul contract presently, formerly, historically or hereafter performed by (Active Transportation) or any other signatory to the NMATA under any circumstances . . . . (GC Exh. 2.)

Because of that specific language it is not necessary to look to see if the agreement may apply to any unnamed and non–signatory employer that is not controlled by the signatory employer. Instead, in this case, we need only determine whether Active Transportation[29] has the right or the power effectively to control the assignment of the work of Safety Carrier's employees *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB at 326.

As to the issue of control, the Board recently examined the ties between a parent and subsidiary in *Dow Chemical Co.*, 326 NLRB 288 (1998). That decision is of interest here even though the instant situation does not involve a parent/subsidiary relationship.[30] In *Dow Chemical* the Board focused on four elements in determining actual or active control. Those elements were (1) common ownership; (2) common management; (3) interrelation of operations and (4) common control of labor relations.

As shown above four people are involved in the ownership of Safety Carriers and three of those people are also involved in the ownership of Active Transportation.[31] The four individuals involved in the ownership of Safety Carrier are Alice Houston, Wade Houston, Charlie Johnson, and Dennis Troha. Wade Houston, Charlie Johnson, and Dennis Troha are the individuals involved in the ownership of Active Transportation.

As to management, I find that the credited evidence established there was no common management. Alice Houston handles overall management of ACS and Safety Carrier. Charlie Johnson handles overall management of Active Transportation. There was no evidence that Johnson has or had, any voice in Safety Carrier management decisions. In fact the opposite was shown. The evidence proved that Alice Houston makes all final management decisions at ACS and Safety Carrier.

As shown above, Alice Houston, Charlie Johnson, and Wade Houston exercised a Voting Trust Agreement[32] on November 7, 1994 (GC Exh. 10).[33] That agreement vest total control of HJ

[27] *NLRB v. Longshoremen ILA*, 447 U.S. at 511 .

[28] As shown in par. 4C of the WPA (above), Safety Carrier would be prevented from bidding or performing any work formerly or hereafter performed by any NMATA signatory. The record shows that Safety Carrier was not controlled by any of those employers. Therefore, the WPA constitutes an illegal work-preservation agreement in regard to all employer signatories of NMATA.

[29] The WPA refers to all NMATA employers as well as its specific reference to Active Transportation. However, the record showed that only where there was common ownership, such as the case of Active and Safety, was there a question as to right to control. Obviously, other employers that lacked common ownership with Safety, have no actual or active control over Safety Carrier. Those other NMATA employers failed to qualify under all four of the *Dow Chemical* indicia.

[30] As shown above in GC Exh. 6, Active and Safety are not parent–subsidiary even though they have some common individual owners.

[31] The Johnson-Houston Corp. which is owned equally by Wade Houston and Charlie Johnson, has a 2/3 ownership in Active Holding Co. Active Holding Co. is 99-percent owner of Active Transportation Co. Although the names are somewhat similar, Johnson-Houston Corp. and HJ Industries are not the same company. As shown herein HJ Industries is controlled by a Voting Trust.

[32] That November 7, 1994 agreement (GC Exh. 10) purports to vest total control of HJ Industries in Alice Houston. HJ Industries holds 2/3 ownership in ACS Holding and in Automotive Carrier Services (ACS). ACS in turn holds full ownership in Safety Carrier.

[33] Charlie Johnson testified as to the reason for the Voting Trust:

The labor laws say you can't double–breast; we're not double–breasting. The labor laws say you're supposed to have different owner-

Industries in Alice Houston as trustee of the Voting Trust and in her own right as 25-percent owner. HJ Industries holds 2/3 ownership in ACS Holding and in Automotive Carrier Services (ACS) and in Safety Carrier (GC Exh. 6).[34] As to the question of actual control, Alice Houston testified regarding her active management of ACS and her indirect management of Safety Carrier. She is the CEO and President of ACS and she oversees the running of Safety Carrier even though the president is Forest Guest.

As to (3) interrelation of operations the evidence showed there is none. The record revealed no interchange of employees, management officials, supervisors, equipment, places of business, or work. There was evidence that ATC Leasing has separate leasing, administrative and management consulting services agreements with Active and Safety Carrier. However, Safety Carrier leases equipment and has subcontracts for services from others as well as ATC Leasing. There was no showing that ATC Leasing or Dennis Troha exercises any operational control beyond the terms of those leases and there is no showing that either makes or contributes to management decisions.

In regard to (4) common control of labor relations, Merrill Frost testified that he is the Machinists union representative responsible for labor contracts with Safety Carrier. The Machinists organized Safety Carrier some time in the late 1980s. Frost first became involved with Safety Carrier in 1991 when he met with a man named Curtis Mechin. After that when he next met, the people representing Safety Carrier were Alice Houston and Diane Chambers. Subsequently he dealt with Alice Houston and Forest Guest regarding labor relations at Safety Carrier. Frost had no dealings with anyone from Active Transportation. There was no evidence of interaction regarding labor relations between Safety Carrier and Active Transportation. Safety Carrier's labor relations are managed on a day–to–day basis by its president—Forest Guest. Alice Houston oversees Guest's work. No one at Active Transportation is involved in the labor relations at Safety Carrier.

In view of the above and the full record, I find that Active Transportation did not have the right of control over Safety Carrier at any material time. Moreover, I find the record shows that Active Transportation did not actually exercise any degree of control over Safety Carrier at any material time.

However, Respondent made a number of points in its brief. Those include the following:

> Respondent attorney Kurt Kobelt[35] testified that he determined that even if the trust was a bona fide trust "there was sufficient ownership links between Active and Safety Carrier to justify making the demand that Safety Carrier be red-circled." [Tr. 449.] The record failed to support Kobelt. As shown above, Kobelt was in possession of documents from both Active and Safety Carrier that illustrated that Active lacked control of Safety Carrier.
>
> Kobelt testified that he concluded by looking at the corporate structure that even putting Mr. Charlie Johnson's interest aside, there was still Mr. Troha and Mr. Houston[36] who between them had common ownership (of Safety Carrier), and Dennis Troha ran ATC Leasing which provides administrative, clerical, equipment and other kinds of services to both companies (i.e., Active Transportation and Safety Carrier).

Again, the record failed to support Kobelt. As shown above, neither Charlie Johnson nor Wade Houston held any voting or managing interest in HJ Industries or in Safety Carrier after execution of the Voting Trust on November 7, 1994. After that date Alice Houston held exclusive control over HJ Industries. In that capacity she also controlled ACS Holding because HJ Industries and Seven T's held ACS Holding. HJ Industries held majority control with its 2/3 interest in ACS Holding. In turn, ACS Holding held a 99-percent interest in ACS and ACS held 100-percent interest in Safety Carrier. The record showed that controlling relationship has continued at material times after November 7, 1994. Moreover, the record shows that Respondent was aware of those facts. As shown above, Active Transportation wrote Respondent on May 3, 1995. Thereafter, an attorney for ACS wrote Respondent on May 12, 1995. On both those occasions Respondent was advised that ACS and Safety Carrier were controlled by Alice Houston. Contrary to Kobelt's testimony those documents show that the interest of Wade Houston and Dennis Troha did not constitute a majority holding of Safety Carrier even if Wade Houston was not included in the trust. If Wade Houston were not considered part of the voting trust then he would have held a 25-percent interest in HJ Industries. However, even under that incorrect assumption Alice Houston held 75-percent interest as trustee and in her own right. Under that assumption, HJ Industries which would have been controlled by Alice Houston, held two-third interest in ACS Holding. Dennis Troha as owner of Seven T's owned only a one-third interest in ACS Holding. Therefore, even in consideration of Kobelt's testimony and the language in F.

ship, different management, different labor people; we set it up so that it would comply to what the labor law says today" (Tr .349.)

[34] ACS (Automotive Carrier Services) is held by ACS Holding (99-percent), and ACS Investing Co. (1-percent). HJ Industries (66–2/3 %) and Seven T's Corp. (33–1/3-percent) own ACS Holding. Alice K. Houston, her husband A. Wade Houston and Charlie W. Johnson executed a Voting Trust Agreement (GC Exh. 10) on November 7, 1994. HJ Industries consisted of 1000 shares. Those shares were owned by Charlie W. Johnson (500 shares), A. Wade Houston (250 shares), and Alice K. Houston (250 shares). A. Wade Houston transferred his 250 shares and Charlie W. Johnson transferred his 500 shares into the Voting Trust, which was represented by its trustee Alice K. Houston. Alice Houston has continued as trustee at all material times. As trustee and a shareholder in her own right, Alice Houston holds 100-percent interest in HJ Industries and by that interest, she holds a controlling interest in ACS Holding and Safety Carrier.

[35] Respondent argued that during the negotiations for the Work-Preservation Agreement "Safety Carrier wanted a 'cushion' so that it could expand beyond the work it was then currently performing." However, Safety was not involved in the negotiations toward the Work Preservation Agreement. The Agreement was completed over Safety Carrier's protest.

[36] However, as shown herein, Houston as well as Johnson, entered into the voting trust whereby full control of HJ Industries was placed in the hands of the trustee, Alice Houston. Troha never had an ownership interest in HJ Industries and his sole relevant interest was in Seven T's, which held only a one-third interest in Safety Carrier.

Larkin Fore's May 12 memo[37] to Kobelt showing that Alice Houston was trustee for Charlie Johnson but not Wade Houston (see Active Exh. 6), Kobelt's alleged determination that Wade Houston and Dennis Troha controlled Safety Carrier lacks factual support.

Respondent argued that Alice Houston, Wade Houston, Charlie Johnson, and Dennis Troha filed documents with the ICC that there was common control of all the companies including Active Transportation and Safety Carrier.[38] Respondent also cited Respondent's Exhibit 28 as supporting its argument of common control of Active Transportation and Safety Carrier. Respondent's Exhibit 28 appears to be Agency comments in ICC case MC–F–20572 and is not dated.[39] The relevant portion of Respondent's Exhibit 28 states:

> HJT Holding is controlled . . . respectively by noncarrier individuals A. Wade Houston (Houston), Charlie W. Johnson (Johnson), and Dennis M. Troha (Troha). Houston, Johnson and Troha also control carriers Automotive Carrier Services Co. (MC–222359). . . . and Houston and Johnson control Johnson–Houston Corporation (MC–170825) and Active Transportation Company (MC–201703). . .

As shown above, Wade Houston, Charlie Johnson, and Alice Houston executed a Voting Trust on November 7, 1994. After that date Alice Houston controlled HJ Industries. Respondent's Exh 28 failed to disprove that Alice Houston controlled HJ Industries after November 7 because that exhibit does not show that it was effective after November 7.[40]

Respondent argued that ATC Leasing provides common services to all the corporations and partnerships, which shows common control. Respondent cited Respondent's Exhibits 2 and 3 to support that argument. Respondent's Exhibit 2 is a "Leasing, Administrative and Management Consulting Services Agreement" between ATC Leasing and ACS.[41] Respondent's Exhibit 3 is a "Leasing, Administrative and Management Consulting Services Agreement" between ATC Leasing and Active Transportation. However, there was no showing that ATC Leasing exercised ownership or management of ACS (Safety Carrier) or Active Transportation, nor was there a showing of interrelationship of operations or common control of labor relations between ACS and Active Transportation.

Respondent argued that circumstantial evidence supports Charlie Johnson's assertions in the work-preservation agreement that the Voting Trust is a sham and is ignored by the four principals. However, the record does not support those assertions. Despite great latitude being afforded Respondent's quests for discovery, the record failed to show that Safety Carrier is managed, or has interrelation of operations or common labor relations with Active Transportation.

I find that the evidence failed to support Respondent's contention that Active Transportation had or has, the right of control over Safety Carrier. The record showed that Respondent engaged in a violation of Section 8(e) through the work-preservation agreement as it regards Safety Carrier, Inc.

CONCLUSIONS OF LAW

1. Teamsters National Automobile Transporters Industry Negotiating Committee is a labor organization within the meaning of Section 2(5) of the Act.

2. Active Transportation Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. Respondent, Teamsters National Automobile Transporters Industry Negotiating Committee by entering into an agreement with Active Transportation Company, which contained language restricting the work of Safety Carrier, has violated Section 8(e) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7) and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

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[37] Fore's memo incorrectly reflected that Alice Houston was trustee for only the interest of Charlie Johnson. Charlie Johnson, A. Wade Houston, and Alice Houston signed the Voting Trust Agreement. That Trust instrument reflects that Johnson was giving control over his 500 shares and A. Wade Houston was giving control over his 250 shares, to the Trustee.

[38] Those documents were received as R. Exhs. 23 and 24. R. Exh. 23 reflects that it was filed on June 20, 1994. That is before execution of the Voting Trust. Therefore, R. Exh. 23 does not show conditions at relevant times.

R. Exh. 24 appears to be a July 20, 1994 internal memorandum from within the ICC, which does not involve either Active Transportation or Safety Carrier. The term "Safety" is used in that document but is in reference to a policy of the ICC called Safety Fitness Policy cited at 8 ICC 2d 123 (1991). Moreover, that document was also dated before the Voting Trust and does not reflect conditions at relevant times.

[39] There was no showing that R. Exh. 28 followed the Voting Trust executed by Alice and Wade Houston and Charlie Johnson on November 7, 1994. From it reading, R. Exh. 28 it appears to predate November 7, 1994.

[40] It was shown throughout the record that substantial corporate changes were made in and shortly after 1994 following the Jupiter purchase. Additionally, as shown above, the Voting Trust was executed in November 1994. For those reasons I find that records before 1994 failed to show conditions at relevant periods. In that regard see Intervenor's Exhs. 2 and 3 (IX 2 and 3). Those documents were dated in 1990 and 1993.

[41] Alice Houston credibly testified about in-house maintenance (Tr 261), other subcontracts (Tr. 260) and leases of equipment from ATC Leasing and others during relevant times (Tr. 239–240).